No. 87-1661

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MOTION FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, AND JAMES P.L. SULLIVAN,
Petitioners,

vs.

FRANK AND LORAIN KADISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARIZONA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

AND

BRIEF AMICUS CURIAE OF CLINTON CAMPBELL CONTRACTOR, INC. d/b/a PHOENIX BRICK YARD

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November 25, 1988

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Movant, Clinton Campbell Contractor, Inc. d/b/a/ Phoenix Brick Yard ("Phoenix Brick Yard"), prays for leave to file the appended Brief Amicus Curiae.

Movant has petitioners' consent to file an amicus brief and it is herewith submitted to the Clerk of the Court. Respondents Kadish, *et al.*, have declined to consent.

MOVANT'S INTEREST

Phoenix Brick Yard is a third generation family-held corporation. It holds leases from the State of Arizona on 23 mining claims situated on state trust lands in southeastern Arizona. The trust lands are in Sections 21, 26, 27, 28 and

35, Township 16 South, Range 17 East. These sections and the undiscovered minerals beneath their surface were not granted or confirmed to the State by either the 1910 Arizona Enabling Act or by the 1927 Jones Act. Rather, they are "indemnity school sections," selected under the 1910 Act in lieu of federally-reserved "mineral" sections or sections that had been otherwise federally preempted.

Movant and its predecessors discovered and perfected movant's mining claims under Arizona's mining law, which is, and always has been, virtually identical to federal mining law.[1] Movant's claims are embodied in four state mineral leases first issued in 1958, 1959 and 1961 for statutorily-prescribed twenty-year terms.

In *Tanner Companies v. Arizona State Land Department*, 142 Ariz. 183, 688 P.2d 1075 (Ariz. Ct. App. 1984), the Arizona Court of Appeals affirmed the reversal of an administrative decision of the Arizona State Land Department. The Department had found that the Pantano clays being mined by Phoenix Brick Yard and Tanner were "common mineral materials" and not "valuable minerals." Based on this finding, the Department refused to honor the statutory "preferred right to renew" applicable to Arizona mineral leases. It determined that, under Section 28 of Arizona's Enabling Act, "common minerals," like sand, gravel, timber, and other natural products on the surface of state trust lands, were not subject to location and leasing as minerals

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[1] *Compare* Act of May 10, 1872, ch. 152, 17 Stat. 91, *et seq.* (1872) (codified at 30 U.S.C. § 22, *et seq.* (1986)) *with* Ariz. Rev. Stat. §§ 3231, *et seq.* (1901) (currently Ariz. Rev. Stat. §§ 27-201 through 27-222 (1976, Supp. 1987)). Arizona Revised Statutes §§ 27-231 through 27-238 (1976; Supp. 1987) provide for the discovery, location, and leasing of mining claims on state lands. These statutes incorporate by reference and parallel the mining laws of the United States, but instead of providing for a patent, as does 30 U.S.C. § 29, they provide that a mining claim locator *"shall have a preferred right"* to a 20-year mineral lease and *"shall have a preferred right to renew the lease."* Ariz. Rev. Stat. § 27-233 (1976).

under Arizona law, but could be disposed of by the State only after appraisal and advertising and at public auction.[2]

The Arizona Court of Appeals disagreed. It affirmed a trial court finding that Pantano clays are valuable "minerals," subject to location and leasing. 142 Ariz. 191–192, 688 P.2d at 1083–1084. If Phoenix Brick Yard were deprived of the use of these minerals, it "could not stay in business." *Id.*

Thereafter, the four mineral leases were renewed for twenty-year terms expiring in 1998, 1999 and 2001. They are subject to the five percent royalty requirement prescribed by Ariz. Rev. Stat. § 27-234. The Arizona Supreme Court declared this section void on the ground that it violated Section 28 of the Arizona Enabling Act.

FACTS AND QUESTIONS PRESENTED BY MOVANT

Phoenix Brick Yard's interest and concern are such that, if the Arizona court's decision is correct, its Arizona leases are invalid under federal law. This is so because Arizona law never has required that mining claims be "appraised" at true value before being converted into mineral leases. Nor have Arizona claims or leases in fact been appraised. This lack of appraisal is the very ground upon which the court declared Arizona's royalty statute, Ariz. Rev. Stat. § 27-234, void under federal law.

The court narrowly confines its holding to this single statute. But, if this royalty statute violates Section 28 of

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[2] Arizona's common mineral statutory scheme, Ariz. Rev. Stat. §§ 27-271 through 27-275 (1976), mirrors the scheme prescribed by federal law *and* required by § 28 of the Enabling Act. Deposits of "common varieties of sand, gravel," et cetera, on federal land are not "valuable minerals" and may not be located as mining claims. 30 U.S.C. § 611. Federal law likewise requires that these "common varieties" can be disposed of only to the "highest responsible qualified bidder." 30 U.S.C. § 602.

the 1910 Enabling Act, so also does Arizona's entire mineral leasing regime, because it is barren of any appraisal requirement. If Section 28 requires that a mining claim be appraised before a mineral lease is issued, as held below, then the issuance of a lease *without appraisal* is a patent breach of trust under its second paragraph. Consequently, all outstanding Arizona mineral leases are "null and void" under the eighth paragraph of Section 28, because none of the mining claims embraced in these leases ever were appraised.

If permitted to file an amicus brief, movant will demonstrate:

1. This Court, without the need to resort to the 1927 Jones Act or the subsequent amendments to Section 28 of the Arizona Enabling Act, should determine that the Arizona court's analysis of paragraphs 3 and 4 of Section 28, as originally enacted, is flawed and that its decision must be reversed.

2. The Arizona court's reliance on the 1928 New Mexico amendment and the 1951 Arizona amendment to divine the intent of Congress is wholly misplaced, and the court fails to perceive or articulate the crucial distinction between *non-competitive leases* for oil and gas *exploration* and *competitive (auctioned) leases* for *production* in oil and gas fields.

3. The majority misstates by omission and plainly misconstrues Article X, Section 3, of the Arizona Constitution.

4. The Arizona court ignores the practical and historical realities of exploring, claiming, discovering, and developing subsurface mineral deposits and the virtual impossiblity of pre-development appraisal of such deposits.

5. The majority fails to consider or apply congressionally-declared national mineral policy that has

endured for more than 100 years, fails to consider the Arizona mineral policy that has been in place since as early as 1915, fails to give any weight to the construction placed on Section 28 by the People of Arizona and their legislature, and usurps power that the Congress delegated exclusively to the Arizona legislature.

Permitting movant to file the appended Brief will enable it to protect its property rights by discussing the points noted in paragraphs 1, 2, and 3, above. These points have not been raised by the parties. In addition, movant urges that a fuller discussion of the points noted in paragraphs 4 and 5 will assist the Court.

Respectfully submitted,

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November 25, 1988

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Respondents.

On Writ of Certiorari
to The Supreme Court of The State of Arizona

BRIEF AMICUS CURIAE OF CLINTON CAMPBELL CONTRACTOR, INC. d/b/a PHOENIX BRICK YARD

Clinton Campbell Contractor, Inc. d/b/a Phoenix Brick Yard ("Phoenix Brick Yard") submits this Brief Amicus Curiae in support of Petitioners.

Introduction

Arizona, like other western land grant states, was organized and admitted to the Union "on an equal footing" with existing states, pursuant to the New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557 (1910) (sometimes hereinafter the "1910 Act" or the "Arizona Enabling Act"). The 1910 Act granted the State of Arizona sections 2 and 32, out of each 36-section township of federal land, and confirmed prior territorial grants of sections 16 and 36.

The 1910 Act contained other large grants for specific public and educational purposes.

Congress expressly reserved from the grants, however, sections "or any parts thereof, [that] are mineral." At the outset, then, it is obvious that, contrary to the analysis of the Arizona court, Congress expressed no "intent" whatsoever in the 1910 Act as to any Arizona mineral leasing regime.[1]

Section 28 of the 1910 Act provided that the granted and confirmed lands "shall be . . . held in trust, to be disposed of in whole or in part only in the manner as herein provided . . . ." (App. 1, par. 1.) It declared that sales, leases or other disposals not made in strict compliance with its provisions shall be a "breach of trust" (par. 2), and that every sale, lease, conveyance or contract not made in conformity with the Act "shall be null and void" (par. 8).

Though the opinion below mentions these provisions, it does not discuss their effect. If, as determined by the Arizona court, short-term leases (referred to in paragraph 3's proviso)[2] must be "appraised at their true value" (App. 1, par. 4), the issuance of such leases without appraisal is a glaring violation of Section 28, and not only is a "breach

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[1] For convenience, relevant portions of the 1910 Act are reproduced as Appendix ("App.") 1 hereto. Section 28 of the 1910 Act contained 10 unnumbered paragraphs. For discussion purposes, *amicus* has numbered each paragraph ("par."). The crucial paragraphs here involved are those numbered 3 and 4. (App. 1, pp. 2a–3a.)

[2] These short-term leases had five-year maximum terms under the original 1910 Act. (*See* App. 1, par. 3.) Under the current version of the Act, short-term leases, depending on their purposes, may be issued for maximum terms up to ten or twenty years. New Mexico-Arizona Enabling Act of 1910, ch. 120, 65 Stat. 51 (1951).

of trust" (par. 2), but also renders every Arizona lease so issued "null and void" (par. 8).

The Arizona court's majority seriously misconstrues the plain words of paragraphs 3 and 4 of Section 28.

Interest of Amicus Curiae

Phoenix Brick Yard is the lessee of 23 mining claims located on state trust lands in southeastern Arizona. The trust lands are "indemnity school sections" numbered 21, 26, 27, 28, and 35. These sections were selected under the Arizona Enabling Act in lieu of federally retained "mineral" sections or sections that earlier had been federally preempted. The claims are embodied in four, twenty-year state mineral leases, obtained and issued pursuant to Arizona's mineral leasing law. Ariz. Rev. Stat. §§ 27-231 through 27-238, 27-254 (1976; Supp. 1987). The claims were not appraised prior to leasing.

Arizona's mineral leasing law does not provide, and never has provided, for appraisal of mining claims or mineral exploration permits prior to their conversion to mineral leases.[3] Ariz. Rev. Stat. § 27-254 (1976). The Arizona court determined that this failure to require appraisal violated federal law, as set forth in the Arizona Enabling Act, Section

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[3] Similarly, Arizona's legislature never has required appraisal in connection with the issuance of oil and gas leases. Arizona's legislature promptly took advantage of the Jones Act. Jones Act, ch. 57, 44 Stat. 1026 (1927) (codified as amended at 43 U.S.C. § 870). On November 15, 1927, it authorized oil and gas leases to be issued for *prospecting* (2 years) and for *production* in commercial quantities (5 years, "renewable for succeeding terms of five years each"). Act of November 15, 1927, § 38(g), 4th Spec. Sess., 1927 Ariz. Sess. Laws 207. *See* App. 3, p. 9a–11a. The 1927 version of the Arizona Enabling Act had no appraisal requirement. Nor did the Arizona legislature impose any appraisal requirement in the State Land Oil and Gas Act of 1939, ch. 87, 1939 Ariz. Sess. Laws 268.

28. But, the court specifically held that *only* the statute relating to rental and royalty payments, Ariz. Rev. Stat. § 27-234, was void. If this determination is not reversed, it is inevitable that the Arizona statutes *permitting* (Ariz. Rev. Stat. § 27-233) and *requiring* (Ariz. Rev. Stat. § 27-254) state mineral leases to be issued without appraisal also violate Section 28. In this event, Phoenix Brick Yard's leases, and those of every other Arizona state mineral lessee, are void.

If the Arizona court's holding is not reversed and Phoenix Brick Yard is deprived of the use of the leased minerals, it cannot "stay in business." *Tanner Companies v. Arizona State Land Department*, 142 Ariz. 183, 192, 688 P.2d 1075, 1084 (Ariz. Ct. App. 1984).

Summary of Argument

Phoenix Brick Yard will demonstrate that the majority's construction of the third and fourth paragraphs of Section 28 of the 1910 Act is illogical and incorrect. The third paragraph of Section 28 states in relevant part:

> "*Provided*, That *nothing herein contained* shall prevent . . . [the] state from leasing any of said lands . . . for a term of five years or less *without said advertisement herein required*." (Emphasis added.)

The Arizona majority concludes that this leasing proviso applies *only within* paragraph 3. It also finds that because paragraph 4 *follows* the leasing proviso, paragraph 4's appraisal/true value requirement is independent from the several other dispositional requirements of paragraph 3. Thus, the majority concludes that paragraph 4's appraisal-at-true-value requirement is free-standing, and is not *pari materia* with Section 28's other dispositional requirements.

Significantly, the majority is silent as to the meaning of the clause "without said advertisement herein required"

in paragraph 3's leasing proviso. The court's failure to confront or even discuss the "advertisement" clause is understandable. Had it done so, it could have reached only one of three conclusions concerning Congress' intent with respect to the advertisement clause.

The first possible conclusion is that the clause "without advertisement herein required" eliminates the cumbersome and costly "publication" requirement set forth in paragraph 3. Eliminating the publication requirement, however, would leave intact the "public auction" requirement of paragraph 3. This construction is implausible because it leads to the absurd result that "public auctions" will be conducted without inviting the public to attend and bid. Such auctions would not be "public" and might be attended only by the friends of the auctioneer and the land commissioner.

The second possible conclusion is that the "advertisement" clause, occurring at the end of a complex sentence containing more than 200 words, is nonsensical or meaningless.

The third possible, and most probably correct, conclusion is that Congress used the word "advertisement" as a shorthand way to describe the procedure of offering and disposing of state lands, leaseholds, timber and other natural products. So construed, the "advertisement" clause is given logical meaning, with "appraisal" followed by "publication" and then "auction" as the steps in the overall disposal process.

Even if this Court should agree with the Arizona majority, that the intent of Congress in 1910 was to exempt short-term leases (as distinguished from sales, contracts, leaseholds and other dispositions) from all of Section 28's dispositional requirements except the appraisal requirement, this 1910 intent cannot be resurrected and applied

to present Arizona mineral leases.[4] To do so would frustrate the purpose of the Jones Act, and would be contrary to Congress' objectives in amending Arizona's Enabling Act in 1936 and again in 1951.[5]

The court below concludes that the appraisal/true value requirement of the 1910 Enabling Act is contrary to and takes precedence over the specific words of the Jones Act. To buffer this conclusion, the majority purports to derive Congress' intent from its role in 1928 in allowing New Mexico to amend its constitution, and from its actions in 1951 in amending Section 28 of Arizona's Enabling Act.

The Arizona court, in both instances, relies on language that was conceived and written in Santa Fe and Phoenix, not in Washington. Congress rubber-stamped *in haec verba* leasing language written and adopted by New Mexico's legislature in 1927 and leasing language written and adopted by Arizona's legislature in 1950. Nevertheless, the Arizona court infers broad congressional purposes and detailed intent from language that Congress did not write.

The court's reliance on the purported role played by Congress in framing the 1928 (New Mexico) and 1951 (Arizona) oil and gas leasing amendments to the Enabling Acts

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[4] It is impossible to read the reports of the proceedings that led to the enactment of the Jones Act without concluding that the congressional distrust of the states and their legislatures, that was so apparent in the 1910 proceedings, had vanished before the Jones Act was adopted in 1927 and Congress authorized amendment of the New Mexico constitution in 1928. The latter proceedings and those that followed in 1936 and 1951 reveal that Congress completely trusted the state legislatures to act in the best interests of their respective states in leasing minerals on trust lands as they "may direct."

[5] As discussed below, Congress' 1951 amendment to the Arizona Enabling Act was drafted by the *Arizona* legislature in 1950.

is entirely misplaced. As shown below, this misplaced reliance stems from the court's utter failure to grasp the crucial and dispositive distinction between the *practical necessity* for issuing non-competitive oil and gas *exploration leases without* appraisal, bidding or auction requirements, and the vital *legal necessity* for issuing oil and gas *production leases* in known fields *only* after competitive bidding or at auction.

The majority below seemingly rejects the plain edicts of the 1927 Jones Act and the 1936 amendment to Arizona's Enabling Act. Both of these statutes reveal the plainly written intent of Congress to vest mineral leasing power and discretion exclusively in the Arizona legislature.

The court also ignores or misconstrues numerous Arizona statutes, and misstates by omission Article X, Section 3 of Arizona's constitution. Almost 40 years ago the legislature and People of Arizona ordained that the leasing proviso of Section 3 of Article X (Section 28, paragraph 3 of the Enabling Act) did in fact apply to Article X of Arizona's constitution (Section 28 of the Enabling Act) *in its entirety. See* App. 9, p. 27a. This squarely contradicts the Arizona court's determination that paragraph 3's leasing clause *must* be confined to that paragraph. The Arizona constitution's words "or elsewhere in Article X contained" cannot be reconciled with the lower court's holding that Ariz. Rev. Stat. § 27-234 violates Arizona's constitution.

ARGUMENT

The Appraisal, Advertising, and Auction Requirements of Section 28 Are Not and Never Were Applicable to Short-Term Leases.

The Arizona court's holding is founded entirely upon its erroneous conclusion that Congress intended, in 1910, that leases of Arizona trust land for short terms of "five

years or less" (App. 1, par. 3) "before being offered, shall be appraised at their true value" (App. 1, par. 4).

If this was not the intent of Congress[6], or, *if* within the four corners of Section 28 it is plain that the words "nothing herein contained" (par. 3) refer to *all of Section 28* and *not just its third paragraph*, then the majority's analysis is invalid and its decision must fall like a house of cards.

The placement of the appraisal-at-true-value requirement (par. 4) after the short-term leasing proviso (par. 3) may have been nothing more than a drafting fortuity. The lengthy, compound sentence that precedes the leasing proviso contains about 175 words. Yet, the reasoning of the three-fifths majority of the Arizona court is based on the *placement* of Section 28's various dispositional requirements, the last of which happens to be the appraisal/true value requirement. In fact, the court stresses the point that the Section 28 language regarding appraisal and true value (par. 4) "*follows*" the leasing proviso (par. 3). 155 Ariz. at 492, 747 P.2d at 1191.

The Arizona court's reasoning requires that the appraisal/true value requirement (par. 4) be treated as a free-standing provision unrelated to the notice, publication and auction requirements of the preceding paragraph 3. The frailty in this reasoning is that it does not take into consideration the phrase "without said advertisement herein required" that is contained in the 1910 leasing proviso. Once again, Congress used the term "*herein*."[7]

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[6] One construction of the 1910 version of Section 28, more logical than the one placed on it by the Arizona court, is that a short-term lease is not a "sale or other disposal" of trust land. Another such construction is that a lease for a term of less than five years does not constitute an "offer" in the sense this word is twice used in paragraph 3 and once used in paragraph 4.

[7] Beginning with Section 19 of the 1910 Arizona Enabling Act, and throughout the 1910 Act, Congress used the words "herein contained," "herein provided," "hereinbefore provided," "hereinafter fixed," and "herein." These words and references often apply to the entire Act. In *some instances* they refer to subjects (*e.g.*, elections) that are covered in several sections. In *every instance* they apply or relate to the section of the Act in which they appear. In *no instance* can their meaning be logically or reasonably confined to a single unnumbered paragraph of a section, much less to one sentence within a paragraph. Yet, the lower court rigidly confines the meaning of the words "nothing herein contained" in paragraph 3's leasing proviso to a single sentence of that paragraph.

It is understandable that the Arizona court does not address the "advertisement" clause. By the court's procrustean reasoning, the word "advertisement" can refer only to the publication requirement, which *precedes* the "advertisement" clause in paragraph 3. The word "advertisement" surely cannot be stretched to include the auction requirement, and the holding of a "public auction" still is necessary. Obviously, such reasoning leads to an absurd result. Before being offered, a two-year grazing lease would have to be "appraised at true value," but then sold at public auction without any notice or publication. Such an auction might be attended only by a few "insiders," thus reducing the number of bidders from which the "highest and best bidder" must be selected.

Congress could not have intended this result. Congress must have used the word "advertisement" as a shorthand way to describe the entire procedure of offering and disposing of trust assets. No other reading makes sense. It makes even less sense for the Arizona court to construe the "nothing herein contained" in the leasing proviso in paragraph 3 as if it read "nothing *hereinabove* contained."

Because Section 28's paragraphs are interrelated and must be considered *pari materia*, the acid test to determine the validity of the court's reasoning is simply to transpose the "breach of trust" provision (par. 2) and the "appraisal at true value" provision (par. 4); or move paragraph 3's leasing proviso to follow paragraph 4. If this is done, it becomes clear that appraisal is a mere step (as it should be)

in the offer-disposition process. The need for a pre-disposition appraisal is dictated by the realities of an auction.[8]

The 1910 language following the appraisal/true value requirements in paragraph 4 of Section 28 of the Enabling Act[9], makes it plain that Congress intended appraisal to be a prerequisite of offer and sale. The 1910 Congress was so concerned about prior "giveaways" of school lands that it employed a "belt and suspenders" approach. It added the requirement that "no lands shall be sold for less than three dollars per acre" and no irrigable lands for "less than twenty-five dollars per acre" in paragraph 5 of Section 28. (App. 1, p. 5a.) Congress thus placed a statutory "floor" under any appraisal that might be made and any bid that might be submitted at a public auction.[10]

The Arizona court's construction of paragraphs 3 and 4 of Section 28 of the 1910 Act cannot withstand reasonable scrutiny. An Arizona two-year grazing lease did not have to be appraised before it was offered in 1912. Neither did a twenty-year mineral lease, before it was offered in 1952 or 1982.

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[8] For example, if a tract of valuable land were offered for sale at auction, it would be downright imprudent for its owner to permit bidding to start at $1.00. Moreover, if the land was held in trust, and the trustee permitted such bidding, his conduct well could constitute a breach of trust.

[9] "... and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. ..."

[10] Congressional mistrust of the management of school trust lands by states and their legislatures was most evident in the hearings, reports, and debates that preceded enactment of the Arizona-New Mexico Enabling Act in 1910. It is no less evident from these same sources that by the time the Jones Act was passed, this congressional mistrust had disappeared. In the 1936 amendment of Arizona's Enabling Act, Congress eliminated the three dollar and twenty-five dollar per acre purchase price minimums. It also eliminated from the leasing clause of Section 28 the words "without said advertisement herein required."

The Arizona Court's Decision Disregards the Meaning and Purpose of Both the 1927 Jones Act and the 1936 Amendment of Arizona's Enabling Act.

When Congress enacted the Jones Act, ch. 57, 44 Stat. 1026 (1927), (codified as amended at 43 U.S.C. § 870), it intended (and repeatedly so avowed in its proceedings) to place Arizona and the other western land grant states on an equal footing *inter se* and with the other land grant states. Subject only to then-existing mining claims and other outstanding federal claims and rights, Congress enlarged prior grants of numbered sections 2, 16, 32 and 36 to embrace sections with these numbers that had been excluded from the prior grants because they were "mineral in character." It transferred to these western states title to and sovereignty over the previously-reserved mineral sections. Plenary leasing power was expressly vested in the state legislatures.

Congress envisioned that each state legislature would adopt a mineral leasing and royalty regime, because it forbade the sale or patent of "coal and other minerals," and broadly granted each state the power to lease "coal and other mineral deposits ... as the State legislature may direct."

Congress also required that the "royalties" from mineral leases must be "utilized for the support or in aid of the common or public schools." The Arizona court ignores the words last quoted. It overlooks the fact that the Jones Act deals with mineral leases and relies entirely on the fourth paragraph of Section 28 of the *1910* Arizona Enabling Act to derive the "mineral leasing" intent of Congress in the *1927* Jones Act. The court also characterizes the Jones Act as a mere "amendment" to the Arizona Enabling Act. 155 Ariz. at 490, 491, 747 P.2d at 1189, 1190.

Arizona's Enabling Act was in fact amended in 1936. This amendment, unlike the later 1951 amendment, originated in Congress, not with the Arizona legislature.

In 1936, Arizona owned a large amount of federally granted land that was *not* located in sections 2, 16, 32 and 36 (*e.g.*, all five of the sections on which Phoenix Brick Yard's mining claims were located).

None of these sections fell within the purview of the Jones Act's grant. Thus after 1927, Arizona was permitted to issue mineral leases in any manner "as its *legislature may direct,*" but only *if the land was located in sections 2, 16, 32 or 36.* As to granted land situated in the other 32 sections (8/9) of each township, Arizona, under its own laws of 1915 and 1927 (App. 2 and 3 hereto), could issue mineral leases, but only for a term of five years, or less, to conform with Enabling Act § 28, par. 3.

Prior to 1936, in congressional contemplation (though Congress doubtless knew otherwise), the 1920 Act had not granted to Arizona any mineral lands that could be leased.

By its plain words, the 1936 amendment to Arizona's Enabling Act was and had to be intended to place all of the land previously granted to the Territory and State of Arizona on equal footing.

The amendment granted the power to issue mineral leases for terms of 20 years or less. Congress, *using exactly the words it used in the Jones Act,* vested the power to lease "as the state legislature may direct." The choice of the identical words was no accident. It ensured, for the purpose of mineral leasing, that all lands granted previously, whether lien lands, indemnity lands or quantity grant lands, would be treated the same as those granted by the Jones Act.

As it related to mineral leasing, the 1936 Arizona Enabling Act amendment was a reenactment of the Jones

Act that applied to all previously granted land not situated in sections 2, 16, 32 or 36.

Through its tortured construction of the third and fourth paragraphs of Section 28 of the 1910 Act (which had nothing whatever to do with minerals or mineral leases), the Arizona court erroneously rejects the Jones Act's grant of sovereignty over "mineral" lands to the states, and contravenes congressional will to place the states on an "equal footing." The decision, by disregarding binding federal law, subverts Congress' grant of authority to Arizona's legislature to lease mineral deposits under state land as it "may direct;" a grant that was expressly reiterated by Congress in 1936.

Congress' objectives in enacting the Jones Act were to divest federal control over vast mineral deposits and to place that control in the state legislatures. The need for this transfer resulted from the extreme difficulty of determining which lands were "mineral in character." This "difficulty" in the western land grant states had resulted in chaos in land titles leading to much vexatious litigation, and had frustrated mineral location and exploitation. If the very character of *mineral* land cannot feasibly be determined, how can subsurface minerals be appraised?

The irony and weakness of the Arizona court's reasoning is that it brushes aside the very historical and legislative premise on which the Jones Act is founded. The majority simply assumes that mineral lands can be identified in advance for leasing. It further unsupportedly assumes that unexplored and undeveloped subterranean mineral deposits can be appraised in advance of exploration and development.

This Court should preserve the law's noble claim to reason by rejecting such artificiality.

Phoenix Brick Yard adopts the petitioners' more complete analysis of the Jones Act and the events and proceedings that led up to its passage.

The Arizona Court Misreads the 1928 Joint Resolution Affecting New Mexico and Misinterprets the 1951 Amendment to the Arizona Enabling Act.

The Arizona majority places much emphasis on cogressional Joint Resolution No. 7, 45 Stat. 58 (1928), which approved New Mexico's proposed constitutional amendment to give that state broad latitude to enter leases and contracts "for the development and production of any and all minerals . . . ." The court relies on this language, and the fact that the "1928 Resolution applied solely to New Mexico and did not mention Arizona at all," to support its conclusion that, in 1928 "Congress was quite aware of just how to give states the right to make mineral leases without meeting the appraisal or true value requirements of the Enabling Act." 155 Ariz. at 491, 492, 747 P.2d at 1190, 1191.

The problem with this approach is that the language that the Arizona court deems so "important" to its analysis was written in Santa Fe, not Washington. Excluding its formal parts, the February 6, 1928 congressional Joint Resolution is a *virtual word-for-word copy*[11] of the amendment that was written and enacted by the New Mexico legislature almost *one year earlier*. *Compare* Joint Resolution No. 7, 45

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[11] Only two changes were made in Congress. *See* Appendices 5 and 6 hereto. A typographical or transciption error was made in the title. The word "protection" was substituted for the word "production." That the change was a mere error is borne out by the fact that the word "production" remains in the operative portion of the act. The other change consisted of the capitalization by Congress of the word "state." These trivia are the sum total of the role of Congress in writing or drafting the New Mexico amendment.

Stat. 58 (1928) (App. 6) *with* New Mexico H. J. R. 8, 1927 N.M. Laws 485 (App. 5).[12]

The record is clear beyond dispute that when the New Mexico resolution was before Congress, approval of the amendment to the New Mexico Constitution was viewed only in the New Mexico context. There was no discussion concerning whether similar problems had developed and should be solved in Arizona or any other state. *See* S. Rep. No. 90, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 332, 70th Cong., 1st Sess. (1928); 69 Cong. Rec. 1517–18, 2094–95 (1928). New Mexico's legislature and its people were not looking beyond their border to solve problems in Arizona. Nor was Congress.

The actions of Congress in connection with the New Mexico amendment scarcely disclose any strong or clear intent of any kind, much less an intent that focused on the appraisal requirement of Section 28 of the Enabling Act. Nor is there any indication that Congress recalled the 1928 New Mexico resolution, which it did not write, when it later considered an amendment to Arizona's Enabling Act in 1936. *See* 155 Ariz. at 492, 747 P.2d at 1191.

The Arizona majority similarly and erroneously relies on the 1951 amendment to the Arizona Enabling Act to ascribe an intent to Congress that Congress could not have had.[13]

As can be seen by comparing Appendices 8 and 11 hereto, the only "intent" displayed by Congress as to the 1951 amendments related to added clause 4. This clause

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[12] The constitutional amendment was adopted by the citizens of New Mexico at a general election held on November 6, 1928.

[13] The court's discussion of the 1928 New Mexico resolution and the 1951 Arizona Enabling Act amendments, along with its repeated declarations of the intent and purpose of Congress are found at 155 Ariz. at 491–492, 747 P.2d 1190–1192.

had nothing to do with the issuance of leases; rather it protected the value of improvements made by a former lessee and required the successor lessee to pay for such improvements. The reference to Article X of the Arizona Constitution was stricken because it could make no sense in a congressional context. The words "without advertisement" were stricken in two places for the obvious reason that Congress had previously eliminated these words in its 1936 amendment of Section 28. This action in and of itself is contrary to the congressional intent found by the Arizona court.

From the Arizona amendment the court finds "congressional intent," "congressional belief," what Congress "did not intend," what "Congress intended," and what "Congress showed." The Arizona court repeatedly characterizes congressional action as to oil and gas leases as "removing" dispositional restrictions, "freeing" the states of these restrictions, or granting "unrestricted" leasing authority. *Passim.*

After describing the 1951 Arizona changes as "most dramatic revisions," the court says that by the 1951 Arizona amendment:

> "Congress specifically removed the appraisal, bidding, and advertising restrictions of § 28, but *only* as they applied to leases of oil, gas and other hydrocarbon substances." 155 Ariz. at 493; 747 P.2d at 1192 (emphasis in original).

The Arizona court further declares:

> "*Significantly*, just as it had with 1928 *Joint* Resolution *No. 7* pertaining only to New Mexico, in the 1951 amendment Congress again showed that when it wished to permit the state unrestricted authority to lease it would do so explicitly." *Id.* (emphasis added).

The quoted statements are incorrect. First, neither Congress nor any of its committees took any part in the crafting or drafting of the salient language contained in either the New Mexico resolution or the Arizona amendment. Any beliefs, intents or purposes exhibited by the Congress could have been founded only on language that had been written and already was enacted in New Mexico and Arizona. Second, neither the New Mexico resolution nor the Arizona amendment "removed" dispositional restrictions or granted "unrestricted" leasing authority.

Like the Joint Resolution that permitted New Mexico to amend its Constitution which was drafted in New Mexico, the 1951 amendment to the Arizona Enabling Act was drafted in Arizona more than a year before Congress acted on June 2, 1951. *See* App. 8. As a matter of fact the People of Arizona on September 12, 1950 also approved the amendment.[14] *See* App. 9, p. 29a.

Instead of removing restrictions or granting unrestricted leasing power, Congress approved state-written measures which gave the Arizona and New Mexico legislatures the option *to advertise or not to advertise* oil leases. The Arizona court's failure to comprehend the legal and practical necessities for this option leads to the collapse of its analysis.[15]

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[14] The legislature of Arizona must have regarded congressional approval as a forthcoming formality. In March, 1951 it adopted an oil and gas act consistent with the prior amendment. *See* App. 10 hereto. This act contained *no* appraisal or advertising requirements for the issuance of non-competitive exploration leases, but production leases could be issued *only* after statewide publication and upon receipt of sealed bids.

[15] Without assuming that congressional recall and intendment are everlasting and infallible, as does the Arizona court; but only assuming that they can "endure the seasons," the New Mexico and Arizona leasing proposals would not have provoked controversy or even debate in Congress. The "option" oil and gas leasing concept was "old hat" to Congress. The oil and gas leasing Act of February 25, 1920, 41 Stat. 441, and later federal acts have included the concept of issuing unadvertised prospect-

Appraisal or advertising prior to the issuance of an oil and gas *exploration lease* would be as futile and meaningless as the appraisal or advertising of an unexplored and undeveloped mining claim prior to the issuance of a mineral lease. A mining claim can be located by digging or boring a hole in the ground and erecting some rock piles three feet high or some posts four feet high. What is the value of a hole in the ground? Even if the rock or aggregate taken from the hole had some showing of the presence of valuable minerals, what legitamate trust purpose could appraisal or advertising serve? The same is true of oil and gas exploration leases or permits, except that there is no hole in the ground. A lease or permit is required before drilling occurs.

The exact opposite is true with respect to oil and gas production leases. Advertising, with bidding or auction, are required. If the legislatures of New Mexico or Arizona enacted a statute that permitted the issuance of an oil and gas production lease by negotiation, or without advertising and competitive written bidding, or at public auction after notice, such a statute would be a breach of trust and a violation of the Enabling Act.

The Arizona court, by its convoluted analysis of paragraphs 3 and 4 of Enabling Act § 28, has erroneously concluded that, as written in 1910, the appraisal-at-true-value requirement of paragraph 4 stands apart from the other dispositional requirements of § 28. The Arizona court uses this same faulty analysis to defeat the mineral leasing objective of Congress in enacting the Jones Act and in amending the Arizona Act in 1936.

As the clincher to its conclusion, the Arizona court invokes *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), as a dispositive holding by this Court. 155 Ariz. at 494-95, 747 P.2d at 1193–94.

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ing permits (exploration leases) on a first-come, first-served basis, but issuing *production leases only after* full-blown notice or advertising and *only to* the highest and best or most responsible bidder.

This Court did indeed say that a short-term Arizona grazing lease must be appraised at true value, before being offered, as is *facially indicated* by Arizona Enabling Act § 28, par. 4 (424 U.S. at 304–307).

Alamo did not involve a mineral lease and this Court had no reason to consider either the 1927 Jones Act's grant of mineral leasing authority or the virtual reiteration of that grant made by Congress in the 1936 amendment to Arizona's Enabling Act.

Alamo's rationale *should not be applied to mineral leases. Amicus* will leave to the parties and the Court the matter of whether the Court's *Alamo* language is *obiter* or a holding of the Court. If *Alamo* holds that short-term Arizona state grazing leases must be appraised at true value, before being offered, *Amicus* respectfully suggests that *Alamo* is wrong for the reasons set forth above (pp. 7–10), and the opinion should be reexamined.

The Arizona Court Overlooks the Legislative Construction Placed on Section 28 since 1915 and Ignores National Mineral Policy.

All Arizona courts, including its highest court, are bound by rules that provide that courts do not legislate. The most fundamental rule of statutory construction is that the court shall ascertain, and give effect to, the true intent of the legislature at the time that it enacted a statute. *E.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 701 P.2d 1182 (1985). In determining what construction to place on a statute, legislative intent is controlling. *E.g.*, *Philbrook*, 421 U.S. at 713; *State v. Weible*, 142 Ariz. 113, 688 P.2d 1005 (1984).[16]

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[16] Whether or not Arizona's supreme court, in deciding an issue of federal law, is bound by the Arizona legislature's repeated interpretation of that law, judicial prudence would suggest that the court should

In 1915, the Arizona legislature acted in response to the authority delegated to it by Congress in the 1910 Enabling Act. Short-term surface leases and mineral leases were authorized without appraisal. It acted again in 1927 in response to the authority Congress delegated in the Jones Act. *See* Apps. 2 and 3.

These responses by the Arizona legislature demonstrate its *contemporary* understanding of the nature and scope of the authority and responsibility conferred upon it by Congress. The contemporary construction of a statute, by the governmental branch charged with its administration, is obviously entitled to great weight in arriving at a proper interpretation of Congress' intent. *Cf., E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54–55 (1977). In the present case, however, the Arizona court does not even mention these and other actions of the Arizona legislature, or its unvarying interpretation of Section 28 of the Enabling Act.

An examination of the law adopted by Arizona's legislature in 1915, Act of June 26, 1915, 2d Spec. Sess., ch. 5, 1915 Ariz. Sess. Laws 13 (*see* App. 2), reveals that the legislature well understood that Arizona was receiving and selecting land under the Enabling Act that was, in fact, mineral in character. This occurred in all the land grant

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at least look at that interpretation. This is especially true when, as in this instance, Congress in successive enactments has expressly delegated to the state legislature the discretion and duty to carry out a federally-mandated power in such manner "as the legislature may direct" or "prescribe." It is another matter for the court to disregard the Arizona Constitution. In 1950, Arizona's People adopted an amendment to Article X of its Constitution, the cognate Arizona counterpart to Section 28 of the Arizona Enabling Act. Section 3 of Article X is the Arizona cognate of paragraph 3 of Enabling Act Article 28. *Compare* App. 9, p. 27a and App. 11, p. 36a. If paragraph 3 read "nothing herein *or elsewhere in Section 28* contained," the Arizona court's determination that paragraph 3 must be read apart from other paragraphs would be utterly invalid! It is, to say the least, surprising that the Arizona court did not discuss or even mention this language in § 3 of Article X, even if the court had rejected it as having no precedential effect on an issue of federal law.

states, and stemmed from the difficulty or impossibility of determining the mineral character of land from a surface examination. This Court addressed a phase of that problem in *Wyoming v. United States*, 255 U.S. 489 (1921).

In the 1915 statute, the Arizona legislature enacted a mineral leasing scheme for state land that reaffirmed the federal procedure for locating mineral claims, and, among other things, gave claim locators a preferred right to lease, provided for five dollars rental per claim, for a two-year lease, (without advertising or appraisement) and limited ore production to fifty tons until a royalty contract was executed (without advertising or appraisement) by the locator and the State Land Department.

Under the lower court's reasoning, Arizona's 1915 mineral leasing statute would have violated the appraisal requirement of Section 28. The 1915 statute was never challenged.

Shortly after Congress enacted the Jones Act in 1927, the Arizona legislature acted to accept the benefits of that Act. Although the present Arizona court fails to recognize the objectives of the Jones Act, Arizona's 1927 legislature clearly did. It immediately reenacted subsections (a) through (f) of Section 38 of the 1915 enactment *in haec verba*.[17] Act of November 15, 1927, 4th Spec. Sess., ch. 24, Ariz. Sess. Laws 207(App. 3). There can be no clearer evidence that the Arizona legislature understood that Congress intended by the Jones Act that "coal and other mineral deposits . . . *shall be subject to lease by the State as the State legislature may direct*." No other explanation exists for the word-for-word reenactment of Section 38.

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[17] Section 38(b) of the 1927 version of the act omitted a clause contained in section 38(b) of the 1915 version of the act. The omitted clause gave citizens, who had found minerals on unsold state land prior to the passage of the act, 90 days within which to apply to the state for a lease (*See* Apps. 2 and 3).

Unlike New Mexico's 1927 legislature, Arizona's 1927 legislature interpreted the Jones Act to confer upon the states the right to issue leases for all minerals, including oil and gas. For this reason, the only changes the Arizona legislature made to Section 38 of the 1915 act (App. 2) were addition of subsection (g), and deletion of the clause referred to in note 17.

In subsection (g), the legislature authorized oil and gas "*prospecting leases*" and "*development and operating leases*" with differing terms and provisions. It also specified a 12½ percent royalty on any oil and gas that was commercially produced. Once again, the Arizona legislature did not construe Section 28 of the Enabling Act to require in this context advertisement or appraisal. It took Congress at its word when it said in the Jones Act that mineral deposits "shall be subject to lease by the State as the State legislature may direct." *See* App. 3.

Arizona's present mineral leasing law, Ariz. Rev. Stat. §§ 27-231 through 27-238, is set forth in Appendix 4. The Arizona legislature's current perception of the meaning and effect of both the Enabling Act and the Jones Act is clear from this law. Section 27-234, of course, is the provision declared void by the opinion below.[18]

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[18] The Arizona legislature's 1961 enactment, providing for mineral prospecting permits, is additional evidence of its sensitivity to the need for mineral exploration and development. Ariz. Rev. Stat. §§ 27-251 through 27-256 provide for exclusive one-year prospecting permits on state land, renewable for five years. Advertisement or bidding are not required. This allows and encourages large-scale exploration, the *quid pro quo* for which is the *mandatory* issuance of an Arizona mineral lease on any minerals discovered and developed within the permitted area. Ariz. Rev. Stat. §§ 27-254 ("... the commissioner *shall* issue a mineral lease ...." (1976) (emphasis added)).

[19] Further evidence of the state legislature's understanding of the Enabling Act is revealed by Arizona's statute relating to the disposition of common mineral materials and products. This act, first adopted in 1967, now appears in Ariz. Rev. Stat. §§ 27-271 through 27-275. The

The Arizona court ignores almost a century of Arizona legislative history. Congress' grant of leasing power was made to Arizona's legislature. Nevertheless, the majority below fails to discuss Arizona's mining laws or to consider the construction placed on the relevant federal acts by the Arizona legislature. The court also neglects to consider the national mineral policy.

A clear exposition of the early national mineral policy is set forth in H.R. Rep. No. 730, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Admin. News 2474. The report points out:

> "Mineral resource utilization comes about only after: (1)prospecting; (2) exploration; and (3) development.
>
> Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain. The incentive for such activity has been the assurance of ultimate private ownership of the minerals and lands so developed. Under these laws, prospectors may go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent. The property, with issuance of patent, becomes the individual's to develop or sell, according to his initiative or desire." 1955 U.S. Code Cong. & Admin. News at 2476.

Similarly, the Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876, provides:

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statute provides in part that no common mineral materials or products will be disposed of at "less than the true appraised value." The regulations supplementing the act permit disposal of common mineral products *only at public auction*.

> "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, . . ."

House Report No. 1442, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5792, points out the need for a mineral policy:

> "There appears to be little argument about the need for a broad national minerals policy to guide both the Federal Government and private industry with respect to this Nation's long-range minerals position. Ours is more and more a mineral-based economy and whether viewed as a part of a peacetime economy or as a necessary mobilization base in times of emergency, the future well-being and national security of our Nation is directly tied to the supply and availability of minerals." 1970 U.S. Code Cong. & Admin. News at 5793.

Any federal grant of school lands to the State of Arizona must be viewed in light of the mining laws, the school trust laws, and public mineral policy. *United States v. Sweet*, 245 U.S. 563, 38 S. Ct. 193, 195 (1918) (where a statute granting school lands to Utah failed to state whether mineral lands were excepted, the grant had to be "read in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will"). *Id.*

When Congress enacted the Jones Act and later amended Arizona's Enabling Act, it did so against the backdrop of the national mineral policy, which was and is intended to promote mineral exploration and production. The Arizona court gave no consideration to this policy.

CONCLUSION

The Arizona court's opinion is more incorrect and its reasoning more invalid for what it assumes and fails to say, than for what it does say. The court simply assumes that an unexplored or undeveloped mining claim can be appraised like a parcel of land, a 99-year leasehold, or a surface deposit of sand or gravel. The court's assumption is as unreal as its assumption that oil and gas leases can or should be issued without advertising or bidding. Here again, in the process of its reasoning to support its tenuous construction of paragraphs 3 and 4 of the 1910 Act, the court is oblivious to the real life, economic differences between oil and gas *exploration* leases and oil and gas *production* leases.

As shown above, the majority's strained reading of paragraphs 3 and 4 of Section 28 of the 1910 Act does not withstand scrutiny. The majority's analysis of Congress' motives, in passing the Jones Act and twice amending Section 28, is even more unrealistic and invalid.

For aught that appears in the opinion below, the only role played by Arizona's legislature since 1912 with regard to mineral leasing on school trust land was its enactment of a statute containing an invalid royalty provision. This clearly is not true. A most cursory examination of Arizona legislative history reveals that, *unlike its supreme court*, Arizona's legislature

– was fully aware of the practical realities that affect hard rock mineral discovery and location and oil and gas exploration, leasing, and development;

– well understood the infeasibility of appraising or auctioning undeveloped subsurface mineral deposits and undiscovered oil and gas, but also knew that leases in proven oil and gas fields *must* be issued *only* to the highest bidder;

– was fully cognizant of national mineral policy and federal mining law, which it has engrafted into Arizona law since statehood;

– was immediately sensitive to the broad grant of power made to it by the 1927 Jones Act that authorized the leasing of mineral deposits, including oil and gas;

– understood at all times (as did the People of Arizona) that the leasing proviso of paragraph 3 of Section 28 of the Enabling Act applied to *all* of the other terms and provisions of Section 28 and not just to paragraph 3 itself.[20]

The opinion of the Arizona court has an appealing patina, but lacks judicial substance. It appears to have been written in a vacuum. It is as if the majority first reached the legislative conclusion that the 5% net royalty rate is too low and must be raised, and then searched for judicial grounds to justify it.

The court's economic analysis simply assumes that a substantial public educational gain will result from

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[20] Indisputable evidence of the Arizona legislature's interpretation of this leasing proviso appears in the act passed by the legislature on March 14, 1950, Act of March 14, 1950, 1st Spec. Sess., 1951 Ariz. Sess. Laws 483. *See* Appendix 8. By vote of the People of Arizona on September 12, 1950, this statute became Section 3, Article X of the Arizona Constitution. On June 2, 1951, Congress rubber-stamped the new leasing proviso. It struck the clause "or elsewhere in Article X" because that clause obviously lacked a federal statutory context. More than 38 years have elapsed since this verbal hiatus was created. Neither Arizona's legislature nor its People have sought to change or delete the "or elsewhere" phrase. (*See* App. 9, p. 27a and App. 11, p. 36a.)

"appraisal" of undeveloped mining claims to determine their "true value" in order to fix the price of a mineral lease.

If the decision of the Arizona court is left standing, the opposite may well prove true. What prospector would blunt his pick or dull his diamond drill on Arizona trust land merely to acquire the privilege of having his claim appraised by a state agent? The answer is, there is none. Instead, he would simply move to the next section or township or state and prospect on federal or non-Arizona land. If he located an economically productive claim on federal land, or on the school trust lands of another western state, he could obtain an outright patent or a mineral lease for a few dollars.

For the foregoing reasons, and those stated in the Brief for Petitioners, the decision of the Arizona court should be reversed.

Respectfully submitted,

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Appendix 1

Note: All underlining added.

Excerpts from Act of June 10, 1910, ch. 310, 36 Stat. 557, 568, 572, 574 and 575 (Arizona Enabling Act)

"CHAP. 310. – An Act . . . to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . ."

"* * *
* * *"

"SEC. 19. That the qualified electors of the Territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona. . . ."

"* * *
* * *"

"SEC. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, . . ."

[Selections in lieu of mineral lands authorized by Congress] (brackets added).

"* * *
* * *"

[par. 1] "SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified. . . . and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

[par. 2] Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

[par. 3] . . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

[par. 4] All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

"* * *"

[par. 8] "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

[par. 9] It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

[par. 10] Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen hereof to enforce the provisions of this Act."

For convenient reference, Section 28 of the Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557, 574–75, is reproduced in its entirety as follows:

"SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided,* That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided,* That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such

moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

Appendix 2

Note: All underlining added.

Excerpts from Act of June 26, 1915, 2d Spec. Sess., ch. 5, 1915 Ariz. Sess. Laws 13

"* * *
* * *"

Sec. 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the State, and the United States, shall have preference right to lease the same, and shall have ninety (90) days after the passage of this act, in which to make application to the department for such lease.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five (5) dollars per claim, receive from the department a lease for two years; provided, however, that no more than fifty tons of ore shall be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms, and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilful misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forefeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state." .

"* * *"

Appendix 3

Note: All underlining added.

Excerpts from Act of November 15, 1927, 4th Spec. Sess., ch. 29, 1927 Ariz. Sess. Laws 207

"Be It Enacted By the Legislature of the State of Arizona:

Section 1. That Section 38 of Chapter 5 of the acts of the Second Special Session of the Second Legislature, State of Arizona, 1915, be and the same is hereby amended to read as follows:

Section 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the state and the United States, shall have preference right to lease the same.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five dollars per claim, receive from the department a lease for two years;

provided, however, that no more than fifty tons of ore shall be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilfull misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forfeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state.

(g) The department is hereby authorized to execute oil and gas prospecting leases which shall run for a term of two years and under which a rental of one hundred dollars shall be paid for each six hundred and forty acres for the two year term. The rental under a lease containing less than six hundred and forty acres shall be at the rate of twenty-five dollars for each one hundred and sixty acres or fraction thereof. Not exceeding two thousand five hundred

and sixty acres shall be included in any one such prospecting lease. A separate lease must be executed for each separate parcel or plot of land, and all lands included in any lease must be adjoining.

In the event lessee shall have started actual drilling for oil and is continuing same, prior to the expiration of the term mentioned in said lease, said lessee shall have the right of renewal, and, provided, that in the event oil or gas shall have been discovered to exist in commercial quantities on lands covered in such lease prior to the expiration of such lease, then and in that event, lessee shall have the right to, and the Department is hereby authorized and directed to issue to said lessee a development and operating lease upon said land which shall run for a period of five years and which upon expiration shall be renewable for succeeding terms of five years each provided, the lessee drill at least two wells, or that the second well is being drilled at the expiration of said lease. Said procedure to continue for each succeeding five year period until three wells have been drilled for each section of land included in the lease. Should the lease be for more than one hundred and sixty acres and less than six hundred and forty acres, the second well may be in the development state at the expiration of the original lease. Such renewals shall be subject to such terms and conditions as may be fixed by law, and the rules and regulations of the State Land Commissioner not in conflict with law. Provided, however, that the annual rental to be charged under the terms of such development and operating lease shall be ten cents per acre per year; and the royalty to be paid to the State of Arizona on the oil and/or gas commercially produced from the said premises under the prospecting and/or development and operating lease shall be twelve and one-half per centum of oil and/or gas produced from said land.

Section 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved November 15, 1927."

Appendix 4

Arizona's Current Mineral Leasing Law (Ariz. Rev. Stat. §§ 27-231 through 27-238)

"§ 27-231. Location of mineral claim on state land; definition

A. Any natural person over eighteen years of age and any other person qualified to transact business in this state who discovers a valuable mineral deposit on any state land may enter upon and locate the deposit as a mineral claim.

B. The term "mineral" includes mineral compound and mineral aggregate.

§ 27-232. Methods of locating claims; extent of extralateral rights

A. If the mineral deposit is a vein, lode or ledge, it may be located in the manner provided for the location of mineral claims upon the public domain of the United States. Upon obtaining a lease on land so located, as provided in this article, the lessee shall be entitled during the term of the lease to extralateral rights in the discovery vein only to the same extent as similar mineral locations upon the public domain of the United States under the provisions of Title 30, United States Code, section 26 (U.S. revised statutes, section 2322).

B. Any mineral claim, however, may be located in conformity with the lines of the public land survey, embracing not more than twenty acres. In such case the location shall be marked upon the ground by erecting a monument or placing a post extending at least three feet above the surface of the ground at each angle corner of the claim, as nearly as possible, and by placing in each monument, or on each post, a memorandum stating the name of the locator,

the name of the claim and designating the corner by reference to cardinal points, and within thirty days thereafter by filing for record in the office of the county recorder of the county in which the claim is located, a notice of location which shall set forth:

1. The name of the locator.

2. The name of the claim.

3. The date of location.

4. The legal description of the land claimed.

C. One copy of the location notice of any claim located pursuant to this section, together with the county recorder's certificate of recordation, shall be filed in the office of the state land commissioner within thirty days after the date of location.

§ 27-233. Preferred right of locator to lease land; discovery work; lease renewal

A. The locator of a lode mining claim or claims on state lands pursuant to this article shall have a preferred right to a mineral lease of each claim within ninety days after the date of location.

B. The locator of a lode mining claim located pursuant to § 27-232 shall be required to perform the discovery work required by law for mining claims under the laws of the United States within the ninety-day period or an equivalent amount of development drilling of a reasonable value of one hundred dollars on each claim. The development drilling may be centrally located and need not be upon each individual claim, but shall be so located as to be part of a plan of development for the group, and in no event shall the minimum requirement prescribed for each individual claim be dispensed with. The locator shall not receive a lease

unless he submits to the state land commissioner satisfactory proof of the performance of such discovery work within such reasonable time as the land commissioner prescribes.

C. Upon application to the commissioner, not less than thirty nor more than sixty days prior to the expiration of the lease, the lessee of mineral lands, if he is not delinquent in the payment of rental or royalty on the date of expiration of the lease, shall have a preferred right to renew the lease bearing even date with the expiration of the old lease for a term of twenty years.

§ 27-234. Rent; royalty; termination of lease by lessee

A. The rental for a mineral lease of state lands shall be fifteen dollars per annum, payable in advance at the time of application for lease and at the beginning of each yearly period thereafter.

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five percent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

C. The lessee of any mineral lease may, if not delinquent in the payment of rent or royalty to the date of termination, terminate the lease at any time during its term by giving the commissioner thirty days' notice of termination in writing.

§ 27-235. Terms of lease

A. Every mineral lease of state lands shall be for a term of twenty years.

B. The lease shall confer the right:

1. To extract and ship minerals, mineral compounds and mineral aggregates from the claim located within planes drawn vertically downward through the exterior boundary lines thereof. In case of leases made pursuant to locations under subsection A of § 27-232, the lease shall confer extralateral rights in the discovery vein similar to those given locators upon the public domain of the United States under the provision of Title 30, United States Code, § 26 (U.S. revised statutes, section 2322).

2. To use as much of the surface as required for purposes incident to mining.

3. Of ingress to and egress from other state lands, whether or not leased for purposes other than mining.

C. Every mineral lease of state lands shall provide for:

1. The performance of annual labor, as required by the laws of the United States, upon each claim or group of claims in common ownership, commencing at the expiration of one year from the date of location, and for furnishing proof thereof to the commissioner.

2. The fencing of all shafts, prospect holes, adits, tunnels and other dangerous mine workings for the protection of live stock.

3. The construction of necessary improvements and installation of necessary machinery and equipment with the right to remove it upon expiration, termination or abandonment of the lease, if all monies owing to the state under the terms of the lease have been paid.

4. The cutting and use of timber and stone upon the claim, not otherwise appropriated, for fuel, construction of necessary improvements, or for drains, roadways, tramways, supports, or other necessary purposes.

5. The right of the lessee and his assigns to transfer the lease.

6. Termination of the lease by the commissioner upon written notice specifically setting forth the default for which forfeiture is declared, and preserving the right to cure the default within a stated period of not less than thirty days.

§ 27-236. Suspension of royalty rights

The commissioner may, if he deems it in the interest of the state, subordinate the royalty rights of the state under this article, or suspend the operation thereof or of any lease executed under the provisions of this article, in favor of the United States or any agency thereof, for the purpose of facilitating extension of financial aid under the laws of the United States in the development or operation of any mine located upon state lands.

§ 27-237. Review by commissioner

All questions arising between a locator or lessee and the commissioner under this article shall be subject to review as in other cases involving state lands, and the locator's or lessee's right to possess and operate his claim shall continue until the question is finally determined.

§ 27-238. Existing leases

Every mineral lease in effect on June 16, 1941 under the provisions of § 2973, Revised Code of 1928, shall remain in effect for the unexpired term for which it was granted, without right of renewal, or, at the option of the lessee, may be superseded by a lease as provided by this article."

Appendix 5

Note: All underlining added.

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF NEW MEXICO

H.J.R. No. 8; Approved March 11, 1927.

"Be it Resolved by the Legislature of the State of New Mexico:

That the following Amendment to the Constitution of the State of New Mexico is hereby proposed to be added thereto as a new Article to be known as ARTICLE XXIV and entitled: CONTRACTS FOR DEVELOPMENT AND PRODUCTION OF MINERALS ON STATE LANDS, to be submitted to the electors of the State at the next general election, when and after the Congress of the United States shall consent thereto.

ARTICLE XXIV

CONTRACTS FOR THE DEVELOPMENT AND PRODUCTION OF MINERALS ON STATE LANDS.

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals on lands granted or confirmed to the State of New Mexico by the Act of Congress of June 20, 1910, entitled "An Act to enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions as may be provided by act of the Legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the

provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

Appendix 6

Note: All underlining added.

Pub. Res. No. 7, ch. 28
45 Stat. 58 (1928)

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That consent is hereby given and granted to the State of New Mexico and the qualified electors thereof to vote upon the question of amending the constitution of said State and to amend the same by the adoption of the following amendment proposed by the legislature of said State at its eighth regular session by H. J. Res. 8, approved March 11, 1927, to be designated as Article XXIV, said amendment being as follows, to wit:

"Article XXIV

"CONTRACTS FOR THE DEVELOPMENT AND PROTECTION OF MINERALS ON STATE LANDS

"Leases and other contracts, reserving a royalty to the State for the development and production of any and all minerals on lands granted or confirmed to the State of New Mexico by the Act of Congress of June 20, 1910, entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States,' may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties, and other proceeds therefrom to be applied and conserved in accordance with the provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

"Consent also is given and granted to said State to enact such laws and establish such rules and regulations as it may deem necessary to carry such constitutional provision into full force and effect should the same be duly and legally adopted."

Approved, February 6, 1928.

Appendix 7

Note: All underlining added.

CONSTITUTION OF NEW MEXICO

ARTICLE XXIV

"Leases on State Land

Section 1. Contracts for the development and production of minerals [or development and operation of geothermal steam and waters] on state lands.

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals [or for the development and operation of geothermal steam and waters] on lands granted or confirmed to the state of New Mexico by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the provisions of said act of congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made." (As added November 6, 1928; as amended November 7, 1967.)

NOTES:

The 1928 amendment proposed by H.J.R. No. 8 (Laws 1927) and adopted by the people on November 6, 1928, added this section as Article XXIV.

The 1967 amendment proposed by H.J.R. No. 17 (Laws 1967) and adopted by the people on November 7, 1967, inserted the words that are bracketed.

Appendix 8

Note: All underlining added.

**Act of March 14, 1950, 1st Spec. Sess.,
1951 Ariz. Sess. Laws 483**

HOUSE CONCURRENT RESOLUTION NO. 5

NINETEENTH LEGISLATURE, FIRST SPECIAL SESSION

"A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO STATE AND SCHOOL LANDS.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF ARIZONA, THE SENATE CONCURRING:

1. The following amendment of section 3, Article X, constitution of Arizona, is proposed, to become valid as a part of the constitution when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor; and if and when section 28 of the Enabling Act of the State of Arizona is amended in such manner as to make this amendment valid:

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full

description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in Article X contained, shall prevent: 1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or, 3. the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substances may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production.

2. The proposed amendment (approved by a majority of members elected to each house of the Legislature, and entered upon the respective journals thereof, together with the ayes and nays thereon) shall by [sic] by the secretary

of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by Article XXI, constitution of Arizona."

Passed the House March 14, 1950 by the following vote: 42 Ayes, 4 Nays, 12 Absent, 0 Excused.

Passed the Senate March 14, 1950 by the following vote: 17 Ayes, 1 Nay, 1 Not voting.

Filed in the Office of the Secretary of State – March 14, 1950.

Appendix 9

Note: All underlining added.

CONSTITUTION OF ARIZONA
Article 10

"§ 3. Mortgage or other encumbrance; sale or lease at public auction

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes,

other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or,

3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substances may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the State of not less than twelve and one-half per cent of production."

Amendment approved election Nov. 5, 1940, eff. Nov. 27, 1940; election Sept. 12, 1950, eff. Oct. 2, 1950.

NOTES:

The governor, on November 27, 1940, proclaimed that the amendment of this section, as proposed by Laws 1939, H.C.R. No. 3, § 1, filed March 13, 1939, had been approved by a majority of the electors in the November 5, 1940 general election and had become law.

Prior to the 1940 amendment, this section had read:

"No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of

the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State Capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; Provided, that nothing herein contained shall prevent the leasing of said lands referred to in this Article, for a term of five years or less, without said advertisement herein required.

The 1940 amendment, in the first sentence, substituted "of the said lands, or any part thereof" for "of the said lands, or any thereof." The proviso at the end of the second sentence of the original section was rewritten by the 1940 amendment and made into a new third sentence which read: "Nothing herein contained, however, shall prevent the leasing of any of the lands referred to in this article in such manner as the legislature may prescribe, for grazing and agricultural purposes, for a term of ten years or less, nor the leasing of any of said lands, whether also leased for grazing and agricultural purposes or not, for mineral purposes (including exploration for oil and gas and the extraction thereof) for a term of twenty years or less, without advertisement."

The governor, on October 2, 1950, proclaimed the amendment of this section, as proposed by Laws 1950, 1st S.S., H.C.R. No. 5, filed March 14, 1950 (see Laws 1951, pp. 483 and 690), had been approved by a majority of the electors in the September 12, 1950 special election and had become law. The effectiveness of the amendment was conditioned on a congressional amendment of the Enabling Act, § 28 "in such manner as to make this amendment valid." The required amendment to the Enabling Act was enacted by Congress in Act of June 2, 1951, c. 120, 65 Stat. 51.

In 1950, the third sentence was again rewritten to read as set out in the present text beginning "Nothing herein, or elsewhere in Article X contained, shall prevent:" and including pars. 1 to 3.

"§ 4. Sale or other disposal; appraisal; minimum price; credit; passing of title

Section 4. All lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

Appendix 10

Note: All underlining added.

Excerpt from Laws of Arizona, 1951

CHAPTER 124

(House Bill No. 9)

"AN ACT

RELATING TO STATE LANDS; PROVIDING FOR THE ISSUANCE OF LEASES OF STATE LANDS FOR THE EXPLORATION FOR AND DEVELOPMENT OF OIL, GAS AND OTHER HYDROCARBON SUBSTANCES WHICH MAY BE PROCURED AND PRODUCED THEREFROM; . . .

Be it Enacted by the Legislature of the State of Arizona:

Section 1. SHORT TITLE. This Act may be cited as the Arizona oil and gas leasing Act of 1951.

Sec. 2. DEFINITIONS. In this Act unless the context otherwise requires:

(a) "department" means the state land department;

(b) "lease" as used herein shall mean an oil and gas lease issued pursuant to the provisions of this Act;

* * *

(h) "state lands" means any land or any interest therein owned or held in trust, or otherwise, by the state, including but not limited to leased school or university lands.

* * *

Sec. 3. LEASING OF STATE LANDS FOR OIL AND GAS. The department, subject to the provisions of this Act, is hereby authorized and empowered to lease state lands for oil and gas and to issue oil and gas leases thereon as follows:

(a) When the state lands are not located within any known geological structure of a producing oil and gas field, as determined pursuant to subsection (c) hereof, the person making the first application for the lease shall be issued a lease covering such lands without competitive bidding:

(1) Such noncompetitive leases shall provide for the payment by the lessee of a royalty of twelve and one-half percent of all oil, gas and other hydrocarbons produced, saved, sold and removed from the lands of the market value thereof at the well as of the time of sale or removal from the lands, as the department may elect.

(2) Such leases shall provide for an annual rental of one dollar and twenty-five cents per acre per year, until oil or gas in paying quantities is discovered on the lands covered by the lease. Such rental shall be payable as follows: . . . The subsequent rental payments from date of such discovery of oil or gas in paying quantities upon the land covered by the lease shall be at the rate of one dollar per acre per year and shall be credited on the royalty payments for that year. All leases shall provide for a minimum rental of eighteen dollars per year.

(3) Such leases shall be for term of five years and as long thereafter as oil, gas or other hydrocarbon substances are procured and produced therefrom in paying quantities. . . .

* * *

(10) Application for noncompetitive leases shall be in writing addressed to the department and shall contain

a description of the lands sufficient to identify same, the name and address of the applicant, and shall be accompanied by a filing fee of ten dollars and the rental payment for the first year. . . .

* * *

(b) When state lands are located within a known geological structure of a producing oil or gas field, as determined pursuant to subsection (c) hereof, such lands shall be leased only by sealed bids, as follows:

(1) Upon receipt of an application to lease any of such lands or whenever, in the opinion of the department, there shall be a demand for the purchase of leases of any such lands, the department shall offer such tract or tracts for lease to the highest qualified bidder submitting a sealed bid therefor, on the basis of a cash bonus.

(2) The department shall publish a call for sealed bids twice in a newspaper of general circulation in the state, the last publication to be not less than fifteen days prior to the date fixed for the opening of the bids. . . .

(3) The publication shall contain a description of the land proposed to be leased, the time when the bids will be received and opened, the royalty to be demanded which the department shall fix prior to call for bids at not less than twelve and one-half percent, and an annual rental to be demanded in the amount of one dollar per acre per year, and which said rental for each year shall be credited on the royalty payments for that year.

* * *

(5) Each such lease shall be for a term of five years and as long thereafter as oil, gas or other hydrocarbon substances are procured and produced in paying quantities from the lands covered by the lease.

* * *

(c) The department shall from time to time determine and designate the known geological structures of producing oil and gas fields. Such determinations and designations shall be published twice in a newspaper of general circulation in the state, the last publication to be not less than five days from the first date of publication. . . .

Sec. 4. WATER. A lessee shall have the right to develop water for use in its operations subject to the applicable laws of this state pertaining to the drilling of water wells and the use of water produced therefrom. . . .

Sec. 5. ASSIGNMENT OF LEASE. . . .

* * *

Sec. 14. EFFECTIVE DATE. This Act shall become effective when the Congress of the United States amends section 28 of the Enabling Act of the state of Arizona, in such manner as to make valid the amendment of section 3, article X, of the Constitution of Arizona, approved by a majority of the qualified electors voting thereon at the special election held on September 12, 1950, and proclaimed by the governor on October 2, 1950.

Sec. 15. EMERGENCY. To preserve the public peace, health, and safety it is necessary that this Act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law."

Approved by the Governor – March 28, 1951.

Filed in the Office of the Secretary of State – March 28, 1951.

Appendix 11

Note: All underlining added.

1951 Amendment to Section 28 of Arizona's Enabling Act
Act of June 2, 1951, ch. 120, 65 Stat. 51 (1951)

Public Law 44 **Chapter 120**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the third paragraph of section 28 of the Act entitled "An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States," approved June 20, 1910, as amended, is amended to read as follows:

"No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save

at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee."

Approved June 2, 1951.